[REPORTED]

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION.

CRIMINAL APPEAL NO.601 OF 1999.

Fulkumar Suratsingh Sigrahwa]
residing at village-Shiroli,]
post-Ritoli, Rohtak, Dist.Haryana]
Occ. Service]
(At present in jail)] Appellant.

versus.

The State of Maharashtra] Respondent.

Mr.S.B.Keswani with Mr.Y.R.Israni for the appellant.

Mr.D.R.More, APP, for the State.

CORAM : D.G.DESHPANDE,J.

DATED : 26th July 2004.

ORAL JUDGMENT

1. Heard Mr.Keswani for the appellant and Mr.More learned APP for the State. This appeal is filed by the appellant/accused challenging order of conviction passed by the Special Judge under N.D.P.S. Act for Greater Mumbai vide his judgment dated ;2nd August 1999 by which the accused came to be convicted under Section 8(c) r/w 20(b) of the N.D.P.S. Act and sentenced him to suffer R.I. for a period of 10 years and to pay fine of Rs.One lac in default R.I. for three months.

2. It was the case of the prosecution that Sr.P.I. at Bhandup Police Station received information from their informant on 6.4.1999 at about 9.00 a.m. that one person aged about 32 to 36 years was likely to carry charas concealed in biscuit tin box for selling it to the customers and, the said person was expected at 14.00 hours at Tank Road, Shivmandir, Bhandup. This information was reduced into writing. Copies of the same were sent to the superior officers viz. ACP and DCP Zone VI. As per the directions given

by them a raid was arranged by PC Dhande. Two panchas were procured. Their search was taken. Pre-trap panchanama was prepared and, thereafter the police party kept watch near Shivmandir, Tank Road, Bhandup. At 14.10 hours a person resembling to the description was seen coming from Tank Road to Shiv Mandir. **He was holding a tin box on his shoulder and as soon as he reached near Shiv Mandir** he was surrounded by raiding party. The officers in the raiding party introduced themselves and the panchas to him and, the said person was the accused in this case. He was made aware of his right under Section 50 of the N.D.P.S. Act. Thereafter, his search was taken. Nothing was found on his person. But in the tin box 7 kg. 750 gms of charas was found. Samples were taken. They were labelled and sealed at the spot. Panchanama was prepared and, thereafter the samples were sent to the Chemical Analyser. It was found containing heroin. Thereafter the accused came to be prosecuted and convicted as stated above.

3. Mr.Keswani, appearing for the accused, challenged the conviction on many counts. However, only aspect on which the appeal is

required to be allowed is the suspicious nature of the whole matter. For that let us see the sequence of events. Sr.PI Tapse received information from his informant that the person, viz. the accused, with certain description was going to come at Shiv Mandir Tank Road, Bhandup at 2 "O" clock in the afternoon. P.W.2 - PSI Surendra Kamble, in his evidence, has stated so. According to him, this information was reduced into writing at that time itself and, accordingly Sr.PI Tapase informed the superior officers i.e. ACP & DCP Zone VI. The Superior Officers gave directions and informed about carrying the raid. Further, according to this witness, PC Dhande procured two persons to act as panch. Their search was taken. Pre-trap panchanama was prepared. According to P.W.4 - Peer Mohd.Noor Mohd.Shaikh, he was attached to Bhandup Police Station. On 6.4.99 he joined his duty at 8.30 hours at Bhandup Police Station, Crime Detection Branch. On the same day at about 9.20 hours, Sr.P.I. called him to his cabin and directed him to go to the office of Anti N/Cell for procuring drug I/kit. A memo was given to him. He handed over the same memo to the Sr.PI Sayyed at N/Cell Azad Maidan and collected the drug I/kit and

reached Bhandup Police Station at 11.00 a.m. He has produced and proved the relevant documents.

4. According to P.W.2 they left the police station at 13.15 hours and started keeping watch near Shiv Mandir Tank Road, Bhandup and at 14.10 hours this accused was found coming from Tank Road to Shiv Mandir. If this sequence of the events is taken into consideration, it mentions that the information was received by the police officer on 6.4.99 at 9.00 a.m. and then necessary steps were taken in that regard and at 2 "O" clock in the afternoon i.e. at 2.10 the accused was seen coming. **According to P.W.2 the accused was seen coming from Tank Road and he was holding tin box on his shoulder.** This tin box, as per the panchanama, had photographs of cine-actresses. P.W.5 Sunil Mishra has stated that when they were keeping watch at 2.10 hours in the afternoon the accused was seen coming from and was also seen carrying a biscuit tin box at his shoulder.

5. In this background, the information received by the police from their informant will

have to be considered. Exhibit 18 is the forwarding letter. It was a letter as deposed to by P.W.2 about sending information to the superior officers. Copy of the station diary in which the information was received and recorded has also been annexed to this letter. In Exhibit 18, which is a copy of forwarding letter, there is mentioned that it is accompanied by an extract of relevant station diary. Therefore, even though the extract of said station diary is not separately exhibited and numbered, it being a part and parcel of Exhibit 18. It stands proved and has to be taken into consideration.

6. In this extract of station diary, which is dated 6.4.99 and timed as 9.15 hours in the morning, what is written is, Sr.PI Tapase got an information from their informant at 9.00 a.m. on 6.4.99 and the information is as under :-

> "That one person by name Fulkumar Sundersingh Shigrahwa-Hindu, **(1)**
>
> between 32 to 36 years, **(2)**
>
> slim, wheatish complexion, reddish and whitish hair, **(3)**
>
> height 5 ft. 5 inches, **(4)**

wearing grey colour payjama and kurta, **(5)**

such a described person is going to come on 6.4.99 at 14.00 hours in front of Miniland, near Shiv Mandir, Tank Road, Bhandup (W).

He will be carrying a biscuit tin box **(6)**

upon which photographs of filmy heros and heroines are pasted----- **(7)**

and he will be carrying the said tin box on his shoulder----- **(8)**

and the tin box will be containing narcotic drugs charas." **(9)**

7. The manner in which this information is recorded clearly shows that it is recorded by the police not at 9.15 hours as stated by them in their evidence or as is alleged in the prosecution case, but it is recorded by the police after the raid was completed and the accused was caught.

8. The learned APP for the State urged in that regard that there is absolutely no cross examination of any of the prosecution witnesses

regarding this station diary entry and there is no challenge to it. However, the falsity of the prosecution case, as is revealed in this information, is that if the information is given at 9.15 hours i.e. five hours before the raid how is it that it also shows in what manner the suspect i.e. the accused was going to carry biscuit tin box. In the station diary what is written is, the suspect will be carrying biscuit tin box on his shoulder. This part of the station diary entry is totally false i.e. it shows that the station diary was recorded after the raid was over.

9. It was contended by the learned APP that the informant could be acquainted with the accused or he could be an accomplice and, therefore, giving detailed description of the accused including his full name, his approximate age, his structure, his complexion, colour of his hair, height in inches could not be suspected, and also giving description of tin in which charas was carrying could not be suspected.

10. However, if the information was given at 9 '0' clock in the morning i.e. 5 hours before

the raid, then it is impossible to believe that the informant would be knowing what clothes the accused would be wearing in the afternoon at 3 ‘0’ clock or that the accused would be carrying a tin box on his shoulder. Mentioning this fact and particularly about carrying of tin box on the shoulder creates doubt.

11. It may be that the informant was very close to the accused or that he could be even accomplice and therefore was knowing all other details of the accused. But it is difficult to understand unless one assumes that informant had some sixth sense to see in future as to how the accused was going to carry tin box on his shoulder. When he has such an occult power, then he could have given such description. It was Sanjay in Mahabharat who was bestowed with such a divine vision. But even then he could not see what would happen in future. He could only see what was happening before his eyes at that particular movement. Admittedly, one cannot assume that the informant had such a power and then the question arises, how the police can write such a thing in the information received.

Only explanation is that information was recorded after the raid was carried out.

12. It was not that the tin box was so heavy that no man could lift it with his hand. It was containing 7 kg. 750 gms. of charas. In ordinary circumstances, any person can carry such a weight by lifting the tin box with his hand.

13. Once the court comes to this irresistible conclusion, the entire case of the prosecution regarding recording of information at 9 "O" clock in the morning, sending the written information to the superior officers at 9.15 hours or before the raid, calling drug I/kit from the Narcotic Cell and other part of the prosecution case become fully suspicious. P.W.2 in his evidence has deposed that all other formalities were completed before they left the police station at 1.15 hours. If the station diary itself is made after the raid, then this evidence of P.W.2 supported by other witnesses has got to be rejected.

14. Consequently, the entire case of the

prosecution become suspicious and if the events of the prosecution case viz. recording of information, complying to the law provisions of NDPS Act, sending information to the seniors, got their permission to carry out raid, calling sample kit, are all rejected, then there is no reason as to why the Court should accept the later part of the story. Therefore for this single reason the appeal is required to be allowed because the trial Court has not at all taken into consideration any of vital and important aspects which goes to the root of the matter.

15. Mr.Keswani for the accused drew my attention to the fact that in this case advocate from Legal Aid Panel was appointed to defend the accused. Mr.Keswani states that the cases under the N.D.P.S. Act attract sever punishment of minimum ten years imprisonment and, therefore, while appointing advocates in such cases, the trial Court should take care to see that the advocates who have dealt with at least 4 to 5 N.D.P.S. cases should only be appointed. He made this submission after going through the cross examination of the important witnesses.

16. I find considerable force in this submission. The N.D.P.S. cases cannot be equated with the cases under the Bombay Prohibition Act. Consequences are very serious and, therefore, copy of this judgment be sent to all the trial Courts dealing with NDPS matters who will take care to see that if the accused are required to be defended by an advocate from the Legal Air Panel, the Judges will appoint only those advocates who have experience of actual conducting minimum three NDPS cases or five sessions cases.

17. Hence the appeal is allowed. The judgment of conviction of the accused under Section 8(c) r/w 20(b) of the N.D.P.S. Act is set aside. He is acquitted of all the charges levelled against him. He should be set at liberty immediately if not required in any other case.

[D.G.DESHPANDE]

26.07.2004 JUDGE.